***United States Court of Appeals***

***for the Second Circuit***

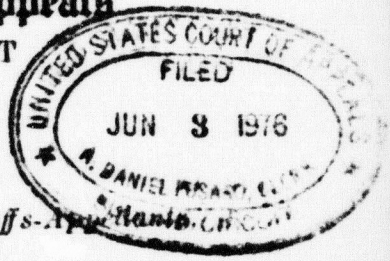

# BRIEF FOR APPELLEE

ORIGINAL

# 76-7040

*To be argued by*
ASHER MARCUS

## United States Court of Appeals
FOR THE SECOND CIRCUIT




MOHAMED ALI and NADIA ALI,

*Plaintiffs-Appellants,*

*against*

A & G COMPANY, INC. and SAADI IBRAHIM,

*Defendants-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR DEFENDANT-APPELLEE A & G COMPANY, INC.

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# United States Court of Appeals
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## BRIEF FOR DEFENDANT-APPELLEE A & G COMPANY, INC.

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### Question Presented

Did Judge MacMahon abuse his discretionary powers in dismissing the plaintiffs' action for lack of prosecution because counsel representing the plaintiffs refused to proceed with the trial of this action and in denying the plaintiffs' motion to vacate his order of dismissal for reasons declared in his memorandum decision printed at pages 97a *et seq.* of the appendix?

It is respectfully submitted that Judge MacMahon did not abuse his discretionary powers (Point I).

## Facts

On October 17, 1975 a pre-trial order was signed by Judge MacMahon which provided (a) that all pre-trial proceedings be completed by December 17, 1975 and (b) that this action "be added to the ready trial calendar on or after January 9, 1976, and thereafter, following publication of this court's trial calendar in the New York Law Journal shall be ready for trial on short telephone notice" (105a).

The case came up before Judge MacMahon on January 9, 1976 and counsel for the plaintiffs and for the defendant A & G Company, Inc. appeared (92a; 98-99a). Counsel appearing for the plaintiffs "sought an adjournment claiming that he was unable to communicate with plaintiffs despite several attempts during the past three days to reach them by telephone" (Judge MacMahon, 99a). Judge MacMahon denied the application for an adjournment. However the case did not go to trial that day.

On January 13, 1976 counsel representing the plaintiffs and the defendant A & G Company, Inc. appeared before Judge MacMahon (94a-95a). "[P]laintiffs' counsel again applied for an adjournment which the court denied" (Judge MacMahon, 100a). "The case was reached for trial on Wednesday, January 14, 1976; the defendants were ready to proceed, but, although plaintiffs' counsel appeared, he refused to proceed, still insisting on an adjournment and protesting that he was unable to reach his clients" (Judge MacMahon, 100a).

Judge MacMahon made an order dismissing the action. Plaintiffs appeal from that order. Plaintiffs then moved to vacate the said order of dismissal (54a-55a). Judge MacMahon denied that motion for reasons stated in his memorandum decision printed at pages 97a *et seq.* of the appendix.

## POINT I

**Judge MacMahon did not abuse his discretionary powers in dismissing the plaintiffs' action for lack of prosecution because counsel representing plaintiffs refused to proceed with the trial of this action and in denying the plaintiffs' motion to vacate his order of dismissal for reasons declared in his memorandum decision printed at pages 97a *et seq.* of the appendix.**

In *Joseph* v. *Norton Company,* 273 F.2d 65, an order of dismisal was affirmed by this Court for this reason, among others:

> "When the case has been assigned to a trial part, further adjournment should be granted only for good cause. On this record it is clear that no good cause was shown for further indulgence. It is the interest of everyone concerned with the proper administration of justice, and especially to litigants and witnesses, that our trial courts should move cases forward for trial and dispose of them promptly when they are reached except where clear and compelling reasons supported by unequivocal and detailed facts require some further adjournment."

In the case at bar the plaintiffs' attorney and the plaintiff failed to present "clear and compelling reasons supported by unequivocal and detailed facts requir[ing] some further adjournment" after January 14, 1976 when counsel for plaintiff was present; particularly in the light of the following:

The plaintiff Mohamed Ali, according to answers to interrogatories signed by the plaintiffs' attorney (44a), instead of being sworn to by Mr. Ali himself as required by Rule 33 of the Federal Rules of Civil Procedure, resided in Jamaica, New York City (38a) and was president of a corporation located in Manhattan, New York City (39a). Yet

counsel for the plaintiffs tried to assure Judge MacMahon that they purportedly "conscientiously attempted to reach plaintiff by telephone without success on the 9th, 13th and 14th days of January, 1976 to advise of the impending trial" (Mr. Napoli, 59a).

It is interesting to note that although Mr. Napoli—a member of the plaintiffs' attorney's firm (56a)—was able to obtain an affidavit from Mr. Ali on February 25th, 1976 (86a) to support his motion for vacate Judge MacMahon's order of dismissal for lack of prosecution, no statement is made by Mr. Ali showing his absence from the City of New York during the time the plaintiffs' attorney was allegedly trying to reach him by telephone.

Moreover, was the plaintiffs' attorney unable to proceed with the trial of this action on January 14, 1976 because he was unable to reach his client on January 9th, 13th and 14th, 1976, or, because the attorney who was supposed to try this case for plaintiff was allegedly actually engaged in trying a different case on January 14th as alleged in Mr. Napoli's affidavit (60a) and as stressed in appellant's brief (p. 4)? What was the attorney who was supposed to try the case, doing on January 9th and 13th?

It is most respectfully submitted that "no good cause was shown for further indulgence" (*Joseph* v. *Norton Company, supra*) by Judge MacMahon concerning plaintiffs' counsel's continued refusal to proceed with the trial of this case. Judge MacMahon's reasons for dismissing this action and refusing to vacate his order of dismissal is amply supported by the holdings of this Court.

In *Maiorani* v. *Kawaski Kisen K.K.Kobe,* 425 F.2d 1162 (cert. den. 399 U.S. 910, reh. den. 400 U.S. 855), Judge MacMahon dismissed the action under circumstances comparable to those in the case at bar. This Court, in affirming Judge MacMahon's order of dismissal, declared:

> "Counsel who had been once accorded the courtesy of an adjournment because of a conflicting professional

> engagement was on notice that this action would be reached for trial on April 15 or shortly thereafter. He deliberately absented himself without any request for a further adjournment under Calendar Rule 7 (b) (1). When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights, too, and the client is not without a remedy."

In *Levine* v. *Colgate-Palmolive Co.*, 283 F.2d 532 (cert. den. 365 U.S. 821, rehear. den. 365 U.S. 855), this Court, in affirming an order of dismissal, declared:

> "Judge Dawson had ample discretion to dismiss plaintiff's action when plaintiff did not appear for trial at the time previously set in pre-trial conference."

The plaintiffs' attorney—who *did* appear by an attorney from his office on January 9th, 13th and 14th, 1976—was hardly entitled to more consideration than the attorney in the *Levine* case who did *not* appear for trial at the time designated in a pre-trial order similar to the one in the case at bar of October 17, 1975.

Other cases of this Court supporting Judge MacMahon's orders in the case at bar: *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818; *Hines* v. *Seaboard Air Line Railroad Co.*, 341 F.2d 229; *Cucurillo* v. *Schulte, Bruns Schif Gesellschaft, M.B.H.* v. *Universal Terminal & Stevedoring Corp.*, 324 F.2d 234; *Ohliger* v. *United States*, 308 F.2d 667; *Parker* v. *Broadcast Music, Inc.*, 289 F.2d 313; *Barton* v. *Mondon*, 298 F.2d 235.

## CONCLUSION

**The orders from which appellant appeals should be affirmed, with costs.**

Respectfully submitted,

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ASHER MARCUS,
*Of Counsel.*

Services of three (3) copies of
the within Brief is
hereby admitted this 26th day
of May, 1976.

Attorney for Def. EBRAHIM

for Norman

Services of three (3) copies of
the within Brief is
hereby admitted this 2nd day
of June, 1976.

Attorney for